

## **REMARKS/ARGUMENTS**

### **I. Introduction**

Reconsideration of this application is respectfully requested. Claims 1-20 are pending. In view of the following remarks, Applicant respectfully submits that the application is in condition for allowance and requests that all outstanding rejections be withdrawn.

### **II. Claim Rejections**

#### **A. Rejection Under 35 U.S.C. § 102(b)**

On page 2 of the Office Action, claims 1, 5-12, and 15-17, are rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,242,085 to Richter et al (“Richter”). The Applicant respectfully traverses the rejection.

A claim is anticipated only if *each and every element* as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 U.S.P.Q.2d 1051, 1053 (Fed. Cir. 1987) (emphasis added); *see M.P.E.P. § 2131*. “The identical invention must be shown in as complete detail as is contained in the . . . claim.” *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 U.S.P.Q.2d 1913, 1920 (Fed. Cir. 1989). Furthermore, the fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic. Instead, the Examiner must provide rationale or evidence tending to show inherency. M.P.E.P. § 2112(IV). A *prima facie* case can be rebutted by evidence showing that the prior art products do not necessarily possess the characteristics of the claimed product. M.P.E.P. § 2112.01(I) (*citing In re Best*, 562 F.2d 1252, 1255, 195 U.S.P.Q. 430, 433 (C.C.P.A. 1977)).

Here, the Applicant respectfully traverses the rejection for the following two reasons: (1) Richter does not expressly or inherently describe each and every element as set forth in at least claims 1, 6, and 11; and (2) the Examiner fails to provide any rationale or evidence tending to show that the container in Richter inherently possesses the recited characteristics.

Richter shows and discloses a liquid container system for use with post-mix beverage dispensers (*see FIGS. 2, 6, & 7; column 1, lines 54-56*). The liquid container system includes a

container 10 having a wall 32, a neck 36 surrounding a container opening 34 (for filling and evacuation), and an air vent 38 extending partway through the wall 32 (FIG. 2; column 3, lines 7-10). The wall 32 includes an outer layer 40, an inner layer 42, and a layer 44 therebetween, wherein the inner layer 42 separates from layers 40 and 44 as the syrup within the inner layer 42 is evacuated (FIG. 6; column 3, lines 24-33). The air vent 38 extends through layers 40 and 44 of the wall 32 but not through the inner layer 42 (FIG. 6; column 4, lines 39-40). Importantly, Richter explicitly states that the “bottom of the container 10 includes the air vent 38, which is preferably about 3/8 inch in diameter” (column 4, lines 5-6) (emphasis added). Moreover, Richter further teaches alternative embodiments having additional air vents 108 and 110 which are recited as being preferably about 1/4 inch in diameter (see FIG. 8; column 5, lines 7-30).

In contrast, independent claims 1, 6, and 11, each recite, *inter alia*:

an open orifice in said base wall of said outer shell, said open orifice being sized to prevent rapid egress of air through said orifice in response to squeezing of said sidewall so that pressure on said inner liner from squeezing said sidewall forces product within said liner out of said outlet opening and said dispensing structure, said orifice being sized to permit slow ingress of ambient air into said shell in response to release of said sidewall to permit said sidewall to return to its unsqueezed configuration. (emphasis added)

This recitation functionally defines the size of the open orifice. Thus, the open orifice of the present invention is sized such that squeezing of the sidewall of the outer shell compresses the volume between the liner and the shell. The compression of the volume between the liner and the shell increases the air pressure in the volume which, in turn, squeezes the liner to dispense the product from within the liner. If the sidewall squeezing forces remain constant, the air within the volume between the shell and the liner then eventually flows through the open orifice sufficiently that squeezing forces are no longer applied to the liner by the air pressure. *See also* page 6, lines 11-20 of the instant specification.

In view of the foregoing, the Applicant respectfully submits that the 3/8 inch and 1/4 inch diameter air vents described in Richter will not prevent the rapid egress of air therethrough. Although Richter describes an air vent 38 to allow the egress of air into the container 10, Richter

nonetheless fails to teach, either expressly or inherently, an open orifice that is sized to meet the functional limitations recited in at least claims 1, 6, and 11. Specifically, Richter does not expressly teach that the container air vent described therein will necessarily function as recited in the claims, nor does the Examiner provide rationale or evidence that the 3/8 inch and 1/4 inch diameter air vents disclosed by Richter would inherently possess the features of the claimed package. *See M.P.E.P. § 2112(IV).* Accordingly, it is respectfully submitted that Richter fails to anticipate at least independent claims 1, 6, and 11. Claims 5, 7-10, 12, and 15-17, depend from at least one of claims 1, 6, and 11, and are submitted as being allowable for at least the same reasons.

**B. Rejections Under 35 U.S.C. § 103(a)**

**1. Claims 2, 4, 12, 14, and 18-20**

On pages 2-3 of the Office Action, claims 2, 4, 12, 14, and 18-20 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Richter. The Examiner states that “Richter et al disclose the claimed invention except for the specific area of the orifice,” and that “[i]t would have been an obvious matter of design choice to modify the Richter et al orifice area [to be] .0007 to .0003 square inch and diameter [to be] 0.010 to 0.060 inch since such a modification would involve a mere change in the size of a component.” The Applicant respectfully traverses the rejection as failing to establish a *prima facie* case of obviousness and further traverses the Examiner’s taking of Official Notice as to these features.

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. *See M.P.E.P. § 2143.*

As set forth above, Richter recites air vent 38 as being 3/8 inch in diameter and further discloses additional air vents 108 and 110 as being 1/4 inch in diameter. Importantly, these diameters result in circular air vents having areas of about .110 square inches and .049 square

inches. In contrast, claims 2 and 12 recite that said open orifice has a size in the range of about 0.0007 to 0.003 square inch; claims 3 and 13 recite that said open orifice is rectangular and has a size of about 0.125 inch by about 0.006 to 0.008 inch; and claims 4 and 14 recite that said open orifice is circular and has a diameter of about 0.010 to 0.060 inch. The Applicant respectfully submits that there is no suggestion or motivation, either in Richter or in the knowledge generally available to one of ordinary skill in the art, to modify the air vent in Richter to meet the recited size ranges in claims 2-4 and 12-14.

Claims 18 and 20 depend from either of claims 1 or 11. For the same reasons set forth above, the Applicant respectfully submits that these claims are allowable.

With regard to the Examiner's assertion that a change in size is generally recognized as being within the level of ordinary skill in the art, there must be some form of evidence in the record to support an assertion of common knowledge. M.P.E.P. § 2144.03(B) (citing *In re Lee*, 277 F.3d 1338, 1344-45, 61 U.S.P.Q.2d 1430, 1434-35 (Fed. Cir. 2002)); see *In re Zurko*, 258 F.3d 1379, 1386, 59 U.S.P.Q.2d 1693, 1697 (Fed. Cir. 2001) (holding that general conclusions concerning what is "basic knowledge" or "common sense" to one of ordinary skill in the art without specific factual findings and some concrete evidence in the record to support these findings will not support an obviousness rejection). Here, the Applicant respectfully submits that there is no evidence in the record to support the Examiner's assertion that changing the size of the air vent in Richter would have been obvious, especially changing the size to meet the particular ranges recited in each of the foregoing claims. Reconsideration is respectfully requested.

## 2. Claims 1-2, 4-12, and 14-20

On pages 3-4 of the Office Action, claims 1-2, 4-12, and 14-20 are rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent 6,083,450 to Safian ("the '450 patent") in view of Richter. Specifically, page 3 of the Office Action states that "Safian shows a package for dispensing a liquid product comprising an outer shell 30, inner liner 32, dispensing structure 82 and open orifice 42," but "lacks the orifice small in size to prevent rapid egress." Richter is cited as teaching such an orifice. The rejection is respectfully traversed for the same reasons set

forth in the Amendment filed October 3, 2005, with regard to the '450 patent and for the reasons set forth above with regard to Richter. That is, neither reference teaches or suggests openings sized to prevent the rapid egress of air therethrough. Furthermore, with regard to the specific size ranges recited in the claims, the Applicant again asserts that there is no evidence in the record to support the Examiner's assertion that changing the size of the air vent in either one of the '450 patent or Richter would have been obvious. Reconsideration is respectfully requested.

### **3. Claims 3 and 13**

On page 3 of the Office Action, claims 3 and 13 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Richter in view of U.S. Patent No. 5,125,534 to Rose et al ("Rose"). Furthermore, on page 4 of the Office Action, claims 3 and 13 are rejected under 35 U.S.C. § 103(a) as being unpatentable over the '450 patent in view of Richter, and further in view of Rose. The Applicant respectfully traverses the rejections.

Claims 3 and 13 recite "said open orifice is rectangular and has a size of about 0.125 inch by about 0.006 to 0.008 inch." As above, Applicant submits that there is no suggestion or motivation, either in the references or in the knowledge generally available to one of ordinary skill in the art, as to why one would modify Richter or the '450 patent to have the specific recited size range. In any case, claims 3 and 13 depend from claims 2 and 12, respectively, and are, thus, submitted as being allowable for at least the same reasons discussed above since Rose does not cure the deficiencies in Richter the '450 patent.

### **III. Conclusion**

In view of the above remarks, Applicant respectfully requests reconsideration and withdrawal of the rejection of claims 1-20. Pending claims 1-20 are believed to be in condition for allowance and Applicant respectfully solicits a notice of allowance indicating the same. No fee is believed to be due for this response in addition to the fees for the one-month extension of time. If, however, additional fees are required, please charge any underpayment, or credit any overpayment, to deposit account no. 22-0261.

If the Examiner believes, for any reason, that personal communication will expedite prosecution of this application, the Examiner is hereby invited to telephone the undersigned at the number provided.

Prompt and favorable consideration of this Amendment is respectfully requested.

Respectfully submitted,



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